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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESSICA LEA ALLRED, Defendant and Appellant.	2d Crim. No. B292018 (Super. Ct. No. 16F-07271) (San Luis Obispo County)

Jessica Lea Allred appeals her conviction by jury for vehicular manslaughter while intoxicated (count 1; Pen. Code, § 191.5, subd. (b))[1], driving under the influence of alcohol causing injury (count 2; Veh. Code, § 23153, subd. (a)) and driving with a .08 percent blood alcohol level causing injury (count 3; Veh. Code, § 23153, subd. (b)), with special findings on counts 2 and 3 that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and operated a vehicle with a blood alcohol

[1] All statutory references are to the Penal Code unless otherwise indicated.

concentration of .15 percent or higher causing injury (Veh. Code, § 23578). The trial dismissed counts 2 and 3 as lesser included offenses (see *People v. Binkerd* (2007) 155 Cal.App.4th 1143) and sentenced appellant to the upper term of four years state prison on count 1 for vehicular manslaughter while intoxicated. We affirm.

Facts

On April 30, 2016, appellant swerved over the center line on State Route 58 and struck and killed Denise Fox in a head-on collision. Appellant had a blood alcohol concentration (BA) of .18 to .20 percent, more than twice the legal limit. She had been drinking at a campsite and concert "the Pozo Stampede."

Before the collision, appellant pulled out of the Pozo Saloon parking lot and tailgated Jeremy Savicki for 15 to 20 minutes. Appellant swerved over the center line and over the road shoulder six to eight times, singing and dancing to music while looking at her cell phone. Savicki was concerned because appellant almost crashed a few times and the road was a rural two-lane highway with sharp turns. When the vehicles reached a straight section, Savicki and appellant passed Timothy Krivinko. Krivinko followed appellant about 10 miles, as appellant tailgated Savicki, the lead vehicle.

Appellant approached a hill where the road had a no-passing double yellow line. Appellant looked at her cell phone, swerved into the oncoming lane, and struck Denise Fox head-on. The vehicles lifted into the air, causing appellant's vehicle to come to rest on the left side of the road. San Luis Obispo County Deputy Sheriff Pablo Munoz, with the help of Krivinko, extracted appellant from her vehicle. Appellant had red watery eyes,

slurred speech, a strong odor of an alcoholic beverage, and repeatedly said that she was late for work and had to call to let them know she wasn't coming in. Fox was pronounced dead at the scene.

Appellant was transported to the hospital and consented to a chemical test which showed that appellant had a BA of .17 percent. A forensic alcohol expert opined that appellant's BA was .18 to .20 percent at the time of the collision (6:15 p.m.) and that appellant had to drink between 5.6 and 7.2 alcoholic drinks in order to have a BA of .17 percent when her blood was drawn (8:00 p.m.). Appellant defended on the theory that the chemical test was flawed and that her BA was .04 percent, one-half the legal limit.

Appellant's boyfriend, Patrick Carufel, testified that appellant arrived at the Pozo Stampede at 1:30 p.m., that appellant drank two or three 12-ounce beers at the campsite, and that appellant consumed another beer when they entered the concert area. The jury was shown a campsite video of appellant playing beer pong and Carufel and the other friends chugging beers. A campsite photo showed two open cases of Coors Light beer, plastic cups, and a bottle of Jack Daniels whiskey.

Ineffective Assistance of Trial Counsel

Appellant claims that she was denied effective assistance of trial counsel because counsel did not object to the questions about whether appellant drank whiskey before the collision. A year before the trial, Andrew Lawrence told an investigator that he, appellant, and Carufel played games at the campsite and went to the concert. Lawrence said that appellant had "a beer or two" and a "handle-full" (a shot straight out of a whiskey bottle) in the concert parking lot. On cross-examination,

the prosecution asked Carufel whether he recalled appellant drinking a "handle-full" of whiskey in the parking lot. Carufel replied, "No, I do not" but agreed it would be helpful to look at Lawrence's statement. Carufel was shown Lawrence's written statement and asked, "You don't recall [appellant] drinking a handle full of whiskey from a bottle?" Carufel answered "I do not recall that."

Appellant stated that she drank three beers and left the concert at 4:30 p.m. to go to work in San Luis Obispo. On cross-examination, the prosecution asked:

"Q. Other individuals in that video are drinking Jack Daniels. Is it possible you had some Jack Daniels?

A. No. [¶] [¶]

Q. If I showed you the statement from another person, might that refresh your recollection as to whether or not you had Jack Daniels?

A. I know I didn't."

To prevail on a claim of ineffective assistance of counsel, appellant must show deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "Failure" to object rarely constitutes constitutionally ineffective legal representation. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.)

Appellant stated that she played beer pong at the campsite but denied that she drank whiskey, although the others were drinking beer and Jack Daniels. The boyfriend, Carufel, did not recall appellant drinking whiskey but agreed that Lawrence's statement could refresh Carufel's recollection as to whether or not appellant had any hard liquor. Carufel reviewed Lawrence's

statement and said "I do not recall that." Lawrence's out-of-court statement was properly used in an attempt to refresh Carufel's and appellant's recollection about what alcoholic beverages were consumed. (Evid. Code, § 771, subd. (a); *People v. Friend* (2009) 47 Cal.4th 1, 40; *People v. Williams* (1997) 16 Cal.4th 635, 672-673 [leading questions may be asked to refresh witness's recollection]; *In re Berman* (1989) 48 Cal.3d 517, 525-526 [inadmissible writing used to refresh witness's memory].) The prosecution may cross-examine a defense character witness about acts inconsistent with the witness's testimony as long as the prosecution has a good faith belief that such acts or conduct actually occurred. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1170.) Lawrence's statement was not read to the jury or received into evidence, nor is this a case where the out-of-court statement was put before the jury under the guise of refreshing a witness's memory. (See *People v.* Parks (1971) 4 Cal.3d 955, 961 (*Parks*) [out-of-court statement should not be read aloud before the jury but should be given to the witness to read]; *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1036 [same].)

On review, we give great deference to trial counsel's tactical decisions. (*People v. Johnson* (2015) 60 Cal.4th 966, 980 (*Johnson*).) Defense counsel, as a matter of trial tactics, may have decided not to object because it would have highlighted Carufel's lack of recollection and undermined appellant's testimony. Appellant insisted that she drank only three beers and three defense witnesses testified that appellant did not appear to be intoxicated. Carufel stated that he walked appellant from the concert to the outside gate and that appellant had no difficulty walking. Defense counsel may have believed that questions about Lawrence's out-of-court statement, if left alone,

would work against the prosecution. Carufel and appellant denied the accuracy of Lawrence's statement and the jury was instructed that "questions are not evidence. . . . Do not assume that something is true just because one of the attorneys asked a question that suggested it was true." (CALCRIM No. 222.) Competent trial counsel would reasonably assume that the jury would follow the instruction.[2] (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

But for counsel's "failure" to object to the questions, there is no reasonable probability that appellant would have obtained a more favorable verdict. (*Strickland, supra,* 466 U.S. at p. 694; *Johnson, supra,* 60 Cal.4th at p. 980; see, e.g., *Parks*, *supra*, 4 Cal.3d at p. 961 [prior recorded statement read aloud before the jury to refresh witness's memory; harmless error].) The evidence showed that appellant's BA was .18 to .20 percent at the time of the collision and that appellant had to drink 5.6 to 7.2 alcoholic drinks in order to have a BA of .17 percent when her blood was drawn. The blood-alcohol test, the 15 to 20 minutes of

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[2] Appellant speculates that the jury may have believed that Lawrence's statement was credible because it was in a police report and referred to a specific brand of whiskey. There is no evidence of that. To prevail on a claim of ineffective assistance of counsel, appellant must prove prejudice that is a demonstrable reality, not simply speculation. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) Appellant complains that defense counsel did not request a limiting instruction, but Lawrence's statement was not received into evidence or shown to the jury. The jury was instructed that questions are not evidence (CALCRIM No. 222). Counsel, as a matter of trial tactics, may have believed that an amplifying instruction would draw the jury's attention to appellant's and Carufel's inconsistent testimony about who drank what before appellant left the concert.

reckless driving, and the objective signs of intoxication was compelling evidence and contradicted appellant's self-serving testimony that she was sober enough to safely drive back to San Luis Obispo.

Upper Term Sentence

Appellant contends that the trial court abused its discretion in finding that appellant's callousness was an aggravating factor and warranted an upper term, four-year sentence. The presentence probation report stated that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, **or callousness**." (Cal. Rules of Court, rule 4.4.21(a)(1).) The trial court found that appellant drove recklessly with an extremely high BA and "was all over the road . . . . Over on the shoulder multiple times; over the divider multiple times; tailgating, all while using her cell phone in plain view. . . . [¶] . . . And the behavior and the choices that were exhibited, in the court's view, also indicate a level of callousness that is a factor in aggravation."

"[W]here the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. [Citation.]" (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) Although the jury did not find appellant guilty of gross vehicular manslaughter, the trial court was vested with the discretion to form its own opinion on the evidence for purposes of sentencing. (*People v. Towne* (2008) 44 Cal.4th 63, 85-86 (*Towne*).) Appellant drove with a BA more than twice the legal limit, tailgated Savicki for 15 to 20 minutes, and almost crashed a few times while looking at her cell phone and dancing to music.

Before appellant reached the crest of the hill, appellant swerved into the opposite lane, causing Fox to sound her horn for two to three seconds. Appellant disregarded the warning, struck Fox head-on, and after the collision, did not ask whether anyone else was injured.

Sufficient evidence supported the trial court's finding that appellant's reckless driving while highly intoxicated exhibited a callous disregard for the lives of others. Callousness, like gross negligence, involves the conscious indifference to the safety and suffering of others. (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 558.) Here it was manifested by 15 to 20 minutes of tailgating, near crashes and weaving, a fatal head-on collision, and a website blog in which appellant presented herself as the victim.[3]

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[3] The prosecution, in a sentencing memorandum, stated that appellant presented herself as the victim on a website blog to encourage people to praise and pay attention to her. The victim's family complained about the blog which stated: "'[i]t's been almost three months since my accident, a.k.a. almost three months since I've been able to walk. . . . Through this experience, I have learned that one of the beauties about life is that you can press the restart button at any given moment and rebuild your life from scratch. This accident has given me the opportunity to do just that.'" The sentencing memorandum further stated that appellant, while released on own recognizance before trial, was seen drinking in San Luis Obispo bars "to the point of being refused service" and bragging that she was not supposed to be drinking. Appellant argued that the blog entries are subject to "multiple interpretations" and that "[f]or the two years [appellant] was out of custody, her behavior was impeccable." The trial court found that appellant had not "owned" up to her drinking problem or the traffic fatality. In sentencing a defendant, the trial court "'may consider the record in the case,

The burden is on appellant to show that the four-year sentence is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

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the probation officer's report, other reports including reports received pursuant to Section 1203.3 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.' (§ 1170, subd. (b).)" (*Towne*, *supra*, 44 Cal.4th at p. 85; see also Cal. Rules of Court, rule 4.408(a) [trial court is free to consider any additional criteria reasonably related to the decision being made].)

Craig Van Rooyan, Judge

Superior Court County of San Luis Obispo

Wayne C. Tobin, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.